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Justice in Robes (2006) & Scott Hershovitz, ed.,
Exploring Law's Empire: The Jurisprudence of
Ronald Dworkin (2006))

Brian Leiter

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Book Review

Ronald Dworkin, *Justice in Robes*. Cambridge, Massachusetts: Harvard University Press, 2006. Pp. 308. Scott Hershovitz (ed.), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*. Oxford: Oxford University Press, 2006. Pp. xi + 328.

Reviewed by Brian Leiter

In writings over four decades Ronald Dworkin has made notable contributions to three literatures: jurisprudence proper, constitutional theory (especially in America), and political philosophy. In the 1960s he emerged as a trenchant critic of H.L.A. Hart's "positivist" theory of law. From the mid-1970s onwards he undertook, as an outgrowth of those criticisms, a somewhat less successful effort to articulate what J.L. Mackie memorably called "a third theory of law," an alternative not only to positivism but also to its traditional opponent, "natural law" theory in its various familiar forms. This third theory held that the institutional history of a legal system—the history, for example, of legislative acts and court decisions—does not exhaust a community's law, since the law also includes the moral principles that figure in the best explanation and justification of that history, as well as whatever concrete decisions follow from those principles.

The third theory might have been aptly called the "Theory of Esoteric Law," since it has as one consequence that much, indeed all, of "the law" in a community may be unknown, indeed never known, by members of that community, insofar as they fail to appreciate the justificatory moral principles and their consequences. Dworkin, in any case, dubbed this theory "law as integrity"—to capture the ideal of principled coherence which animates it—and made it the primary focus of his 1986 monograph *Law's Empire*. It is a central topic for the contributors to *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, a collection of essays edited by Scott Hershovitz.

Beginning in the 1970s, and continuing to the present day, Dworkin has also been a spirited proponent of what he came to call "the moral reading" of the

Brian Leiter is the Hines H. Baker & Thelma Kelley Baker Chair in Law, Professor of Philosophy, and Director of the Law & Philosophy Program, The University of Texas at Austin.

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U.S. Constitution (the subtitle of his 1996 collection of essays *Freedom's Law*). This approach emphasizes the role of general moral principles "about political decency and justice" in the Constitution, and the ensuing need for the judges who interpret and apply its provisions to engage, in effect, in systematic moral reflection of the kind academic philosophers undertake. Dworkin's "moral reading" of the Constitution, as critics never tire of pointing out, amounted to a sustained defense of the "liberal" position on most constitutional questions, from affirmative action to abortion. It is a central topic for many of the non-philosophical contributors to *Exploring Law's Empire*.

Finally, in a series of articles starting in the 1980s and culminating in his 2000 book *Sovereign Virtue*, Dworkin has defended a distinct brand of liberal egalitarianism which has commanded substantial attention from political philosophers investigating the theory of equality. However, neither of the books under review offers much to those primarily interested in Dworkin's work on equality.

The essays in Dworkin's own collection *Justice in Robes* (most, but not all, published previously) take on two sets of critics who cut across Dworkin's jurisprudential and constitutional interests: H.L.A. Hart and other legal positivists on the one hand, and various American jurists (Antonin Scalia, Richard Posner) and constitutional law scholars (notably Cass Sunstein) on the other. The posthumously published 1994 "Postscript" to Hart's 1961 classic *The Concept of Law* looms especially large over the jurisprudential essays in this volume, and for obvious reasons. As Nicola Lacey revealed in her illuminating biography *The Nightmare and the Noble Dream*, Hart was frustrated by "Dworkin's fluid and sometimes elusive analytic style" and came to feel "that there was something willful or even lacking in honesty about Dworkin's reading of his work."¹ The "Postscript," with its painstaking accounting of the multiple instances where Dworkin misstated Hart's views, betrays an exasperation that could only be embarrassing to its target. The most ambitious theoretical piece in the volume, Chapter 6 on Hart's "Postscript," is Dworkin's response.

The rejoinder, alas, does much to confirm Hart's doubts. Dworkin organizes his reply around a hypothetical case involving "Mrs. Sorenson," who has been injured by a defective drug whose precise manufacturer she cannot identify because many companies produced the same product. Common law courts responded to this kind of problem by inventing a new doctrine, "market-share liability," requiring manufacturers to pay damages for harm based on their "market share" of the dangerous product without requiring individualized proof by the plaintiff that defendant's version of the product caused the injuries in question. Dworkin thinks Mrs. Sorenson was legally entitled to this remedy even before clever judges crafted the new rule, and—more to the point here—he thinks Hart was committed to denying that Mrs. Sorenson was entitled to

1. Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* 330, 350 (New York, 2004).

such a remedy, since the existing legal authorities did not explicitly establish it. “Hart and I hold opposite opinions about the same issue,” says Dworkin.²

But this is false, if the issue is, as it appears to be, the remedy that ought to be awarded Mrs. Sorenson. For Dworkin runs together the question “What is the law in this jurisdiction?” with the question “How ought a particular case be decided?” Positivists have always been clear that a judge’s legal duty to apply valid law can be overridden by moral or equitable considerations in any particular case, and Hart’s general theory (“the sources thesis”) that “laws” are distinguished by their source—by their being enacted, for example, by a legislative body or figuring in the holding of a court—is simply silent on how the wronged Mrs. Sorenson should be treated. On Dworkin’s Theory of Esoteric Law, however, it seems every moral wrong must have a preordained *legal* remedy—even though no one knew the law required it!—so that forward-looking jurists who craft new legal rules in response to real world problems are really only “discovering” a legal remedy that already existed in Dworkinian Heaven.

Readers of *Law’s Empire* had long thought that Dworkin had not given us an account of the concept of *law* in competition with Hart’s, but rather an account of *ideal law*, of what the law “ought to be” if it realized the many virtues we associate with the “rule of law”—what, in a word, Dworkin calls “integrity.” Dworkin’s rejoinder to Hart’s “Postscript” now effectively concedes the point. Dworkin tells us that he is really interested in an analysis of the concept of “legality” or the “rule of law,” a necessarily evaluative inquiry. Surprisingly, however, Dworkin denies this is the “concession” it appears to be, since Hart’s “sources thesis” is, he says, itself really “a conception of legality”! This incredible claim occurs on page 170 of *Justice in Robes*. It is surrounded by sentences that have the syntactic form of arguments, but this reviewer, at least, must confess that neither he nor his seminar students at the University of Chicago last fall were able to supply any coherent semantics that would satisfy the demands of interpretive charity.

There are other philosophically ambitious chapters in this collection, but they are likely to command less attention than the reply to Hart. Chapter 7 is a savage reply to Jules Coleman’s critique of Dworkin’s views,³ though it may be most notable for containing Dworkin’s first extended rejoinder to his longtime Oxford colleague, and Hart’s philosophical heir, Joseph Raz. Unfortunately, Dworkin’s rendering of Raz’s views on the authority of law is largely unrecognizable, which makes the choice to reprint it here somewhat surprising. The volume’s “Introduction” and the new chapter on “The Concepts of Law” both introduce a baroque array of fresh distinctions, without demonstrating that they either map on to or illuminate any debate

2. Ronald M. Dworkin, *Justice in Robes* 144 (Cambridge, Mass., 2006).

3. Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (New York, 2001).

that anyone else has been having. They richly support Hart's worry about "Dworkin's fluid and sometimes elusive analytic style."⁴

Dworkin is more interesting as a dialectical opponent of his American targets. Against Scalia's "originalism," Dworkin argues that to treat the meaning of the constitutional text as bound to the quite concrete expectations of its framers (expectations about, e.g., segregation in the schools) is to betray the very general language they use (for example, "equal protection of the laws"). If the framers meant to permit segregated schools, why did they not just write "Freed slaves shall enjoy the equal protection of the laws of contract, but nothing written here shall be construed to preclude segregated public facilities"? Yet one might still worry whether current jurists are more likely to fill in the meaning of "equal protection" more adequately than those who crafted the provision or those jurists who interpreted it previously. As Sunstein, writing in *The New Republic*, noted: "Dworkin does not come to terms with the risk of judicial error in the moral domain."⁵

Posner is someone who, like Dworkin, does not think a lot about the problem of "judicial error in the moral domain." He renounces moral theory, yet would have judges reach the "best" decisions on crudely utilitarian grounds, without excessive regard for past practice, except to the extent that practice has affected reasonable expectations. In Chapter 3, Dworkin argues, very plausibly, that Posner "is himself ruled by an inarticulate, subterranean...but relentless moral faith," namely, in the utilitarian perspective that informs his analyses of concrete legal problems. Dworkin is also devastating regarding Posner's ill-considered (but happily short-lived) attempt to supply a "Darwinian" foundation for his utilitarianism. Dworkin remains oddly silent, however, on the extraordinary influence of Judge Posner's opinions with other American courts, which might suggest that, even without Darwinian foundations or moral theory, Posner is the proverbial Hegelian "Owl of Minerva," who has captured the moral ethos of his time and place. That Dworkin's own writings about concrete legal problems have had almost no influence at all on the American courts might also be thought to confirm Judge Posner's skepticism about moral theory, at least if we agree that Dworkin is the more skillful moral theorist.

Dworkin associates Judge Posner's view with that of his colleague Cass Sunstein, dubbing it "a Chicago School of anti-theoretical, no-nonsense jurisprudence" which urges focus on "the immediate practical problem posed" by any legal case.⁶ Sunstein, however, as Dworkin recognizes, does not subscribe to Posner's armchair utilitarianism. Sunstein defends judicial "minimalism": on the one hand, the empirical claim that judges largely avoid grand theoretical underpinnings for their resolution of particular controversies; on the other hand, the normative claim that

4. Lacey, A Life of H.L.A. Hart, *supra* note 1, at 350.

5. Cass R. Sunstein, Virtues and Verdicts, *The New Republic*, May 22, 2006, at 37.

6. Dworkin, Justice in Robes, *supra* note 2, at 51.

they are right to do so, because articulation of “grand theories” is more likely to obstruct than facilitate agreement, and because articulating a grand moral vision is in any case the proper task of the polity as a whole, rather than the judiciary.

Against this, Dworkin notes that “any legal argument is vulnerable to what we might call justificatory ascent,” namely, our discovery that a particular principle on which we are relying “is inconsistent with...some other principle that we must rely on to justify some other and larger part of the law.” He is surely right that there is “no a priori limit to the justificatory ascent into which a problem will draw”⁷ lawyers and judges, but everything turns on what legal constraints actually govern this ascent.

Consider Dworkin’s own central example: Judge Benjamin Cardozo’s seminal decision in *MacPherson v. Buick Motor Co.* *MacPherson* established that manufacturers of dangerous products could no longer escape liability to the consumers injured by their products by citing lack of contractual privity (since consumers typically purchased the products from some intermediary). This new rule made good economic sense in an age of retailers who distributed mass-produced goods to thousands (sometimes millions) of consumers. Here, the potential for injury was enormous, but producers (not retailers) were obviously in the best position to minimize the dangers.

Cardozo’s decision is justly celebrated as skillfully eliding clear precedents establishing the necessity of contractual privity for liability, to create the best new rule for new circumstances—precisely the kind of outcome-oriented decision Judge Posner commends. Dworkin, on the other hand, celebrates the opinion as an exercise in “justificatory ascent.” Yet if we are to distinguish legally principled justificatory ascent in Dworkin’s sense from Posner’s enlightened policy making by courts, we need some compelling explanation of how the result in *MacPherson* was *required* by the existing legal materials and the principles they embodied. Dworkin, who is the master of the Just-So story, weaves a tale, to be sure, but it will be mysterious to all but the true believers why it should be preferred to the more familiar narrative (favored by Cardozo himself) of Cardozo as wise law-maker filling gaps in the law, or the more recent view of Cardozo as proto-economic analyst of the law, designing rules that would minimize the costs of accidents. While Dworkin castigates Posner and Sunstein for not “avoiding moral theory but keeping its use dark, cloaked under all the familiar phlogistons like the mysterious craft of lawyer-like analogical reasoning,” they might as easily have castigated him for not acknowledging the role of law making by courts “but keeping its use dark, cloaked under all the familiar phlogistons like the mysterious justificatory ascent.”

Hershovitz set himself a difficult task in trying to find “leading scholars in jurisprudence...who are sympathetic to Ronald Dworkin’s work.” Jeremy Waldron is best known for his un-Dworkinian hostility to judicial review. His

7. *Id.* at 54.

contribution to the Hershovitz volume, exploring the challenge of Critical Legal Studies and some dilemmas it poses for Dworkin, does little to advance the theory of "law as integrity." John Gardner, who succeeded Dworkin in the Chair of Jurisprudence at Oxford, only followed the editor's charge "to contribute to Dworkin's project" to the extent that his essay may be the first actual instance on record of a "constructive interpretation" in Dworkin's sense of the term. For to show Dworkin's work "in its best light," Gardner argues that the best interpretation of Dworkin's inconsistent remarks about the "purpose" of law render his theory consistent with legal positivism! (Dworkin's testy response to Gardner, in the same volume, manifests his familiar habit of accusing all critics of "bewildering" and "mysterious" misreading and confusions.) Stephen Perry's contribution to this volume adds interesting new criticisms of Dworkin's oft-criticized theory of "associative obligations" to obey the law, but Perry's insightful contribution only weakens, rather than strengthens, the theoretical edifice of *Law's Empire*.

The three younger scholars who contribute to the volume are distinctly friendlier to Dworkin. Hershovitz and Dale Smith present illuminating explorations of Dworkin's ideal of "integrity" in adjudication, especially in relation to the doctrine of precedent. Mark Greenberg develops a quite complicated defence (in two separate chapters) of what he calls a Dworkinian version of anti-positivism according to which "value facts are among the determinants of the content of law." According to Greenberg, facts about institutional practices (e.g., facts about what courts and legislatures have done in the past) can only "rationally" determine the content of the law by relying upon evaluative considerations "about the relevance of [the] descriptive facts" about these institutional practices. As Greenberg admits, his point is not at all specific to the law: "What rules a set of practices rationally determine will depend on what aspects of the practices are relevant and how those aspects are relevant."⁸

It is less clear whether this states any dispute with legal positivism. Positivists deny that legally valid norms are necessarily morally valid, and it is unclear that evaluative judgments about relevance will necessarily implicate morality. And as Greenberg himself argues, "*even if* morality were the relevant value...it would not follow that the content of the law would necessarily be morally good or even that the moral goodness of a [norm would even] count in favor" of its being legally valid. The metaphysics of "rational determination" is interesting in its own right, and intersects with general problems in philosophy about rule-following and meaning-skepticism, but it does not help make any point against positivist theories of law.

Ultimately, the Hershovitz collection is unsatisfying. Dworkin's jurisprudential writing has been subjected to criticisms as trenchant as, and often more successful than, those Dworkin levelled against Hart.

8. Mark Greenberg, How Facts Make Law, in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* 250-51 (Scott Hershovitz ed., New York, 2006).

A volume that forced a systematic Dworkinian response to Joseph Raz, Philip Soper, Leslie Green, Simon Blackburn, and other critics would have been quite welcome, and might have done something to redeem the reputation of his jurisprudential work. Instead, Herschovitz has given us a collection of fawning essays by liberal American constitutional law scholars, and an eclectic mix of (sometimes independently interesting) essays by legal philosophers which are only loosely related to the main themes of Dworkin's theory of "law as integrity" and are entirely silent on the doubts that explain why the theory has almost no adherents. *Justice in Robes*, by contrast, is more likely to be of continued interest, certainly in the United States, for its stimulating critiques of the views of important American jurists and legal theorists.